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82-1404

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

NO._____

EDWARD ROBERT NIGRO, JR.,

(Real Party In Interest), Petitioner

vs

UNITED STATES OF AMERICA,

Respondent.

APPENDIX I THROUGH IV

FOR PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOHN D. KAUFMANN
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February 17, 1983

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APPENDIX 1

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

In Re Grand Jury Proceeding) 82-2		
EDWARD ROBERT NIGRO, JR., (Real Party in Interest),	)	
Appellant,	)	NO. 82-2422
vs.	)	
UNITED STATES OF AMERICA,	)	
Appellee.	)	

Appeal from the United States District Court for the District of Colorado (D.C. No. 82-Y-101)

John D. Kaufmann, Tucson, Arizona, for Appellant.

Gerald J. Rafferty, Assistant United States Attorney, Denver, Colorado (Robert N. Miller, United States Attorney Denver, Colorado, with him on the brief) for Appellee.

Before DOYLE, McKAY, and LOGAN, Circuit Judges.

DOYLE, Circuit Judge.

Appellant Edward Nigro seeks to reverse entry of a contempt citation by the District Court of the District of Colorado and seeks also remand with instructions that he be free to invoke his Fifth Amendment privilege against self-incrimination before the grand jury and to have it applicable to a matter which would incriminate him in foreign countries. Nigro assigns a number of grounds in support of his demand for relief. All were considered by the trial court except one, which is whether there should have been a hearing regarding facts which would mitigate the contempt sanctions. The grand jury which was investigating alleged violations of federal narcotics, customs and other laws, subpoenaed Nigro to appear before it and give testimony on July 27 and July 28, 1982. He did appear before the Grand Jury on the basis of issuance

of a Writ of Habeas Corpus. He refused, however, to testify. Instead he invoked his privilege against self-incrimination. Thereupon following a motion by the United States Attorney the trial court entered an order granting immunity pursuant to 18 U.S.C. §6002 and §6003. The court order dated July 28, 1982, is in part as follows:

> 1. That the witness Edward Robert Nigro give testimony or provide other information which he refuses to give or to provide on the basis of his privilege against self-incrimination as to all matters about which he may be interrogated before said grand jury;
>
> 2. That no testimony or other information compelled under this order (or any information directly or indirectly derived from such testimony or other information) may be used against said witness in any criminal case, in any court except a prosecution for perjury, giving a false statement or otherwise failing to comply with this order.

The questions which Mr. Nigro refused to answer had to do with illegal import and export of money between the United

States and foreign counrtries; illegal laundering of narcotics money inside and outside the territory of the United States; illegal laundering of narcotics money through offshore corporations or banks; and sources of money received from operation of narcotics operations. Nigro was called back before the grand jury and given another opportunity to answer questions, but he refused again to answer anything and thereupon the government moved that the trial court punish Nigro for his refusal to comply with the court order compelling his testimony pursuant to 28 U.S.C. §1826(a).

Thereupon Nigro sought to have the grand jury subpoena quashed on the basis that the court's immunity order would not extend to foreign prosecutions and, secondly, that it would not afford his protection co-extensive with his privilege against self-incrimination. He also

alleged procedural irregularities and directed other attacks against his incarceration.

On September 24, 1982 a hearing was held. A carefully written opinion was issued on November 17, 1982 by the trial court. It rejected all of the grounds Mr. Nigro asserted in his effort to justify his refusal to testify notwithstanding his grant of immunity.

The trial court gave no acceptance to the foreign prosecution point. The judge said: "Neither at the hearings nor in the briefs has Mr. Nigro established that his fears of foreign prosecution are real, substantial and reasonable and based on objective facts as distinguished from his subjective speculation." The court further found that Mr. Nigro showed insufficient connection between the areas of the grand jury's inquiry and potential

foreign prosecution for his testimony. Thus there was no evidence that if charges were filed in a foreign country, Nigro would be subject to extradition from the United States; there was insufficient evidence to believe that Nigro's testimony would be disclosed to a foreign government; and there was no showing of a risk that the evidence might incriminate Nigro in a foreign jurisdiction.

Also found by the trial court was that Nigro's claims were generally without merit. His motions for discovery were premature and contrary to Rule 6 (c) F.R.Cr.P. He was an immunity witness before the grand jury and was not a target in the proceedings. His contention that he could not comply with the order to testify because the government's questions were tainted by illegal electronic surveillance were rejected because the trial court found that only

valid consensual surveillance occurred and that the government would give the transcripts of those conversations to Mr. Nigro.

The further contention of Nigro was that some of the questions he was asked before the grand jury included information derived from plea discussions held in Tucson, Arizona about possible charges in Colorado conducted pursuant to Rule 11 (e)(6), F.R.Cr.P. These discussions did not result in any agreement and Nigro entered a guilty plea to the Arizona charges in the United States District Court for Arizona. The trial court ruled that since such a plea was entered Mr. Nigro's statements were available to the government under Rule 11 (e)(6)(D), F.R.Cr.P. Therefore, Mr. Nigro could not be excused from testifying before the grand jury on such a basis.

Also rejected by the trial court was Nigro's assertion that the grand jury proceedings had been tainted; this as a result of an Assistant United States Attorney, a court reporter and Nigro himself being present during the deliberations and voting of the grand jury. The "deliberations" were only a momentary consideration which occurred after the United States Attorney asked members of the grand jury whether they approved of his taking Mr. Nigro before the United States District Court to seek immunity and an order compelling him to testify. The trial court viewed the taint as insignificant and only a technical violation of Rule 6 (d) F.R.Cr. P. Inasmuch as Nigro was an immunized witness he was not prejudiced in any event.

The trial court concluded that there was nothing in the record that precluded Nigro from testifying before

the grand jury and the trial court found him in civil contempt for his refusal to obey its lawful order. He is subject to being confined until he agrees to testify before the grand jury or until the particular grand jury is terminated. The time spent in jail by Nigro as a result of this contempt sentence is not to be credited to the sentences he is already serving.

Defendant has tendered numerous contentions. We do not deem it necessary to consider each and every one. These can be reduced to the following:

I

> That the District Court erred in that it violated 28 U.S.C. §1826 by not issuing an order to show cause, by failing to give adequate notice.

II

> That the trial court erred in determining that the Fifth Amendment (of the Constitution) is inapplicable to foreign prosecution and that the

appellant does not face a real and substantial fear of foreign prosecution.

A

That the Fifth Amendment applies to the threat of prosecution.

B

That the immunity granted was not co-extensive with the Fifth Amendment privilege against self-incrimination.

There is only one essential problem and we address ourselves to that. We consider in detail only one of appellant's contentions.

1. Adequacy of Safeguards for grand jury secrecy.

Mr. Nigro's Fifth Amendment arguments lose their importance if the emphasis is placed where it belongs, that is on the sufficiency of Rule 6 (e), F.R.Cr.P. That rule's guarantees of secrecy for Mr. Nigro's compelled disclosures are such that he has no reason to fear foreign prosecutions based on

his grand jury testimony. The trial court followed the majority of circuits when it concluded that "in view of the power and duty of this court to preserve the secrecy of grand jury matters, no 'real and substantial' danger of foreign prosecution exists based on his ordered testimony." This court can confidently affirm that rule.

The Supreme Court in Zicarelli v. New Jersey Investigation Comm'n., 406 U.S. 472, 378 set forth the standard that a witness must satisfy to invoke the privilege against self-incrimination. Applied to Mr. Nigro Zicarelli means he must show that his fears of foreign prosecution are real, and based upon objective facts; the Fifth Amendment privilege "protects against real dangers, not remote and speculative possibilities." Id. The majority of the circuits which have considered

whether an immunized witness is compelled to testify before a grand jury was adequately protected from leaks of his testimony to foreign authorities seeking to prosecute him, have held that grand jury proceedings are sufficiently secret to eliminate any reasonable concerns the witness may have as to foreign prosecution. In Re Baird, 668 F. 2d. 432, 434 (8th Cir.,) cert. denied 102 S. Ct. 2255 (1982); United States v. Brummit, 665 F. 2d. 521, 525-26 (5th Cir., 1981), cert. denied, 102 S. Ct. 2244 (1982); In Re Campbell, 628 F. 2d. 1260, 1262 (9th Cir., 1980); In Re Federal Grand Jury Witness (Lemieux) 597 F. 2d. 1166, 1167-68 (9th Cir., 1979); In Re Grand Jury Proceedings (Postal), 559 F. 2d. 234, 236-37, (5th Cir., 1977), cert. denied, 434 U.S. 1062 (1978); In Re Weir, 495 F. 2d. 879, 881 (5th Cir.) cert. denied, 419 U.S. 1038 (1974);

United States v. Armstrong, 476 F. 2d. 313, 316 (5th Cir., 1973); In Re Tierney, 465 F. 2d. 806, 812 (5th Cir., 1972), cert. denied, 410 U.S. 914 (1973).

This court has already affirmed the adequacy of Rule 6 (e), F.R.Cr.P. as a safeguard for the secrecy of immunized testimony before a grand jury where there was a threat of foreign prosecution alleged. In Re Parker, 411 F. 2d. 1067, 1070 (10th Cir., 1969), vacated as moot sub. nom. Parker v. United States, 397 U.S. 96 (1970). Our viewpoint on this has not changed.

The few courts which have expressed reservations about the secrecy of grand jury proceedings have pointed out a number of factors which suggest that such proceedings cannot be leakproof. The Second Circuit's recent decision, In Re Flanagan, No. 82-6058 (2nd Cir., Oct. 13, 1982), for instance makes the

following points:

1. Grand jurors or government agents might inadvertently leak testimony to reporters.

2. Other defendants can require disclosure of grand jury minutes containing exculpatory material under Brady v. Maryland, 373 U.S. 83 (1963).

3. Defendants can also require trial witnesses to disclose their grand jury testimony regarding matters testified to on direct examination. 18 U.S.C. §3500 (e)(3).

4. Courts permit disclosure of grand jury minutes when they are relevant to a motion to dismiss an indictment, or raising a double jeopardy claim or challenging a search warrant, or concerning post-conviction proceedings.

5. Grand jury records can also be released for use in private litigation.

See Flanagan, supra, slip op. at 59-60, and the authorities cited therein. See also, In Re Federal Grand Jury Witness (Lemieux), 597 F. 2d. 1166, 1168-69 (9th Cir., 1979) (Hufstedler J., concurring); In Re Cardassi, 351 F. Supp. 1080 (D.C. Conn., 1972). The

suggestions do not rise above remote possibilities.

This court is not unaware of the hesitancy of a witness in Nigro's position even though Nigro is solely responsible for the difficulty of his position. He has violated the laws of several countries and must testify about those illegal activities before a grand jury if the trial court's order is affirmed. He must weigh the certainty of a contempt citation here against the likelihood of some day being prosecuted abroad should he be extradited or otherwise come within the jurisdiction of foreign laws he has broken. He has been, however, given immunity so he is not too bad off.

To protect him from the possibility of facing foreign prosecutions based on incriminating disclosures before the grand jury this court should affirm the

trial court's contempt citation, but return the case to that court with the following recommendations which will promote and support secrecy by adherence to Rule 6(e) in Mr. Nigro's case:

> 1. The District Court should require all participants in the grand jury proceedings to take an oath of secrecy regarding Mr. Nigro's testimony.
>
> 2. The transcripts of his immunized testimony should be sealed.
>
> 3. Future requests from disclosure should be reviewed in camera by the District Court which should zealously protect the immunity it conferred upon Mr. Nigro.

These measures are endored by the United States as appellee, see Appellee's Brief at 12-13, and this type of protection has found approval in other decisions; In Re Federal Grand Jury Witness (Lemieux), 597 F. 2d. 1166, 1167-68 (9th Cir., 1979); In Re Tierney, 465 F. 2d. 806, 812 (5th Cir., 1972),

cert. denied, 410 U.S. 914 (1973).

The affirmation of Parker above means it is unnecessary to consider whether Mr. Nigro showed a sufficient risk of foreign prosecution to entitle him to remain silent. The conclusion that Rule 6 (e), F.R.Cr.P, as bolstered by the recommendations above, will adequately protect the secrecy of Mr. Nigro's disclosures makes irrelevant an inquiry into the likelihood of the risks of foreign prosecutions he may face.

2. Grand Jury Proceedings and Civil Contempt Procedures.

Due to the constraints of 28 U.S.C. §1826 (b) which purports to require this court to decide this appeal within 30 days of its filing, it is imposible to address in this opinion each issue Mr. Nigro raises as fully as this court might do in less hurried circumstances.

The court has considered the positions presented in the briefs and oral arguments. We find no error in the trial court's conclusions of law expressed in its Memorandum Opinion and summarized above. It follows that the judgment of the District Court including the contempt citation against Mr. Nigro should be affirmed. It is so ordered. We do not consider the other contention based upon the Fifth Amendment. Our ruling renders this unnecessary.

END

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Misc. No: 82-Y-101

IN RE GRAND JURY PROCEEDING 82-2 (RELATING TO EDWARD ROBERT NIGRO, JR., Petitioner)	) MEMORANDUM OPINION AND ORDER

CHIEF JUDGE SHERMAN G. FINESILVER:

This matter is before the Court on two principal matters: (1) Petitioner's Motion to Quash Writ of Habeas Corpus Ad Prosequendum filed by Edward Robert Nigro, Jr., Petitioner; and (2) the government's Petition Pursuant to 28 U.S.C. §1826 (a) for a Rule to Show Cause why Mr. Nigro should not be held in contempt of court for failure to give testimony before a federal grand jury. Mr. Nigro was subpoenaed to appear before a federal grand jury in Colorado which was investigating alleged violations of federal narcotics, customs and other

laws.[1] On July 27 and 28, 1982, Mr. Nigro appeared before Grand Jury 82-2 pursuant to a Writ of Habeas Corpus. Mr. Nigro refused to testify invoking his privilege against self-incrimination. Thereafter, upon appropriate motion by the United States Attorney and supporting documents an order granting immunity was entered pursuant to 18 U.S.C. §6002 and §6003. The court order dated July 28, 1982 read in part as follows:

> NOW, THEREFORE, IT IS ORDERED pursuant to 18 U.S.C. §6002:
>
> 1. That the witness Edward Robert Nigro give testimony or provide other information which he refuses to give or to provide on the basis of his

---

[1] Title 21 U.S.C. §841 (a)(1), §846 and §848; Title 18 U.S.C. §2; and Title 26 U.S.C. §7203 and §7206 (1).

Mr. Nigro refused to answer questions concerning illegal import and export of money between the United States and unnamed countries; illegal laundering of narcotics money inside and outside the territorial United States; illegal laundering of narcotics money through offshore corporations or banks; sources of money received from operation of narcotics operations.

privilege against self-incrimination as to all matters about which he may be interrogated before said grand jury;

2. That no testimony or other information compelled under this order (or any information directly or indirectly derived from such testimony or other information) may be used against said witness in any criminal case, in any court, except a prosecution for perjury, giving a false statement or otherwise failing to comply with this order.

Mr. Nigro returned to the grand jury on the same date the immunity order was entered and refused to answer any questions. The Government moved the court for entry of sanctions against Mr. Nigro for his refusal to comply with the court order ordering his testimony [28 U.S.C. §1826 (a)].

Thereafter, Mr. Nigro through his counsel, moved to quash the grand jury subpoena alleging (a) that the court's immunity order would not safeguard him

from foreign prosecution and (b) it would not afford him protection co-extensive with his privilege against self-incrimination.

Mr. Nigro also asserted other grounds for not testifying, alleging procedural irregularities and other attacks directed against his incarceration. Motions that had been filed on his behalf include violations of Rule 6, F.R.Cr.P., abuse of process and others.

A hearing on the Motion was held on September 24, 1982, at which time Mr. Nigro set forth his reasons for denial of testimony.

I

The main issue involved is whether a witness who has been granted immunity against the use of his testimony in federal and state prosecutions may present possible foreign prosecution as a basis for his claim of self-incrimination

before a grand jury.

In the context of the factual backdrop of this case, we answer in the negative.

Neither at the hearings nor in the briefs has Mr. Nigro established that his fears of foreign prosecution are real, substantial and reasonable and based on objective facts as distinguished from his subjective speculation. Fifth Amendment "privilege protects against real dangers, not remote and speculative possibilities". Zicarelli v. New Jersey State Commission of Investigation, 406 U.S. 472, 478 (1972). The individual seeking to invoke the Fifth Amendment privilege against self-incrimination bears the heavy burden of establishing (1) that the subject of the government's questions raises "real danger", that the individual may be compelled to disclose information that might incriminate him

under foreign law and (2) that he legitimately entertains a "real and substantial" fear that his prosecution by a foreign government is likely to follow. United States v. Yanagita, 552 F. 2d. 940, 946 (2nd Cir., 1977).

Provisions of the constitution and Fifth Amendment apply only to restrain officials who act under the laws of the United States; they do not extend their protection to persons who are subject to prosecution by wholly unrelated governments abroad. In Re Parker, 411 F. 2d. 1067 (10th Cir., 1969) vacated as moot sub mon. Parker v. United States, 397 U.S. 96 (1970). In In Re Parker the trial court held a witness in civil contempt for refusing to answer grand jury questions. In a thorough and well reasoned opinion, the Appellate Court affirmed. The case remains strong precedent in this circuit.

In Re Parker, supra, holds (a) that the secrecy attending grand jury proceedings serves as a sufficient protection for an immunized witness that there is no real risk of foreign prosecution and (b) the witness cannot invoke her privilege against self-incrimination after receiving court immunization. Id, at 1069. In accord, Zicarelli v. New Jersey State Commission of Investigation, 406 U.S. 472 (1972).

In In Re Parker the trial and Appellate Courts were directed to the body of law of a specific country (Canada) to determine whether there was a danger of incrimination under the law of that foreign country. In the instant case, Mr. Nigro in his broad claim of protection merely asserts that he may be subject to charges by some unnamed foreign jurisdiction. Clearly, his claim of privilege against prosecution is

speculative and lacks any specificity. In the stronger case of In Re Parker the claim of the immunized witness was disallowed.

We have considered and reject Mr. Nigro's argument that public disclosure of his grand jury testimony is inevitable and that when such disclosure occurs, various foreign jurisdictions will descend upon him. However, upon inquiry by the Court at the time of oral argument, counsel for Mr. Nigro was unable to cite a single case or present any legal precedent where foreign prosecutors sought extradition and prosecution of a grand jury witness on the basis of his immunized testimony.

Mr. Nigro is adequately protected by the provisions of Rule 6 (e), F.R. Cr.P. requiring that grand jury testimony be kept secret and this safeguard eliminates any reasonable ground for apprehending foreign prosecution. In

Re Parker, supra; In Re Baird, 668 F. 2d. 432, 434 (8th Cir., 1982), cert. denied, 102 S. Ct. 2255 (1982); United States v. Brummitt, 665 F. 2d. 521 (5th Cir., 1981), cert. denied, 102 S. Ct. 2244 (1982); In Re Campbell, 628 F. 2d. 1260 (9th Cir., 1980); In Re Tierney, 465 F. 2d. 806 (5th Cir., 1972), cert. denied, 410 U.S. 914 (1973). See discussion in In Re Flanagan, _____ F. 2d. ____ (2d Cir., 1982) slip opinion, October 13, 1982.

Another important factor is that the grant of immunity is as broad as possible under 18 U.S.C. §6002 and §6003; it is co-extensive with the self-incrimination privilege under the constitution and applicable law. Petitioner can expect no more. Under Rule 6 (e)(2)[2] government attorneys are not authorized to disclose grand jury testimony to

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[2]See Appendix for excerpt of Rule 6, F.R.Cr.P.

foreign authorities without prior Court authorization. Although Rule 6 (e)(3)(a) permits disclosure to an attorney for the government "for use in the performance of such attorney's duty and to government personnel deemed necessary to assist an attorney for the government in enforcing federal criminal law" that exception does not allow federal law enforcement officials without first obtaining a court order under Rule 6 (e)(3)(c)(i). See, In Re Baird, supra, at 434 and United States v. Brummitt, supra, at 524.

Mr. Nigro's arugment ignores the fact that a court which has granted immunity to a grand jury witness who demonstrates a "real danger" that his compelled testimony could provide a basis for foreign prosecution would be unlikely to permit disclosure of grand jury testimony to foreign authorities.

As one court has observed:

> To infer that this court would on the one hand give defendant immunity, and on the other hand renege on its own integrity is so difficult to assume it is speculative. Only the court can give immunity; only the court can order the witness to answer; only the court can order disclosure.

See, United States v. Brummitt, supra, 525 n. 4; See also, In Re Tierney, supra; In Re Campbell, supra; and In Re Parker, supra.

If disclosure is requested by foreign authorities, or if disclosure is sought on other grounds at a later stage in the proceedings, appropriate steps can be taken to minimize any risk that immunized testimony would be disclosed in violation of a witness' constitutional rights. See Kastigar v. United States, 406 U.S. 441, reh. denied 408 U.S. 931 (1972).

Clearly in view of the power and duty of this Court to preserve the secrecy of grand jury matters, no "real and substantial" danger of foreign

prosecution exists based on his ordered testimony. Zicarelli v. New Jersey States Commission of Investigation, supra; In Re Parker, supra; and see special concurring opinion In Re Flanagan, supra, Slip Opinion October 13, 1982, page 62, 63.

In Re Flanagan, ____ F. 2d. ____ (2d Cir., 1982) (Slip opinion October 13, 1982) is the latest authority to uphold the requirement of testimony under grant of immunity notwithstanding a claim of potential foreign prosecution.

Flanagan was subpoenaed to testify before a grand jury investigating a conspiracy to smuggle fire arms and ammunition for the United States to the Irish Republic Army in Ireland, in violation of 26 U.S.C. §5861 and 22 U.S.C. §2778 (b)(2) and (c). He asserted his Fifth Amenment privilege

to refuse to testify on the grounds of self-incrimination. An order was entered pursuant to 18 U.S.C. §6002 and §6003, compelling him to "give testimony or provide other information . . . as to all matters about which he may be interrogated before the grand jury". Notwithstanding the immunity grant, Mr. Flanagan persisted in invoking the Fifth Amendment and refused to answer questions before the grand jury claiming that because the immunity order did not purport to protect him from prosecution in Ireland or the United Kingdom, it could not supplant his constitutional privilege against self-incrimination.

The circuit court reviewed current authorities and reversed the trial court's refusal to hold Mr. Flanagan in civil contempt for his refusal to testify before a grand jury under a

grant of immunity. The appeal's court held that interrogation before the grand jury would not violate his right to protection against self-incrimination since Flanagan failed to demonstrate any real or substantial fear of foreign prosecution as a result of his giving grand jury testimony. The Appellate Court did not decide the question whether, when immunity is granted a grand jury witness, the Fifth Amendment protects him against disclosure of information that would expose him to a substantial risk of foreign prosecution. Judge Van Graafeiland, in a special concurring opinion, held in effect that the spirit and tenor of Rule 6 (3) of the F.R.Cr.P. would afford the petitioner sufficient protection and that the "likelihood is that the tradition of grand jury secrecy, which is older than the Nation itself . . . will not be cavalierly disregarded."

There is another point urged in petitioner's argument. He contends that the existence of foreign narcotics laws and membership by many countries in a compact outlawing violations of said laws, legitimatizes his "real fear of prosecution:. In support, he cites the 1961 Multilateral Single Convention on Narcotics Law; 18 U.S.C. §1407. This statute must be read together with 26 U.S.C. §1739 (Amending Protocol). In our view this argument does not support petitioner's position.

A reading of the applicable statutes lead to the conclusion that the Single Convention and Amending Protocol require the member countries to the convention to be bound to observe the constitutional, legal and administrative systems of member nations. According to our analysis, this would include grants of

immunity.

In sum we find that there is no existence of potential foreign prosecution of Mr. Nigro; no nexus has been established between areas of inquiry of the grand jury and potential foreign prosecution for this testimony; there is no evidence that if charges were filed in a foreign country, Mr. Nigro would be subject to extradition from the United States; the likelihood that Mr. Nigro's testimony would be disclosed to a foreign government has not been extablished; and further the risk is not sufficiently substantial to justify a real fear that the evidence might incriminate Mr. Nigro in a foreign jurisdiction.

Mr. Nigro's refusal to testify on the grounds stated under the several motions is without support in fact or law.

The Court finds in favor of the government and against the claim of the Petitioner.[3]

II

The procedural arguments advanced by Mr. Nigro with regard to alleged abuses by the government simply do not provide a basis for non-compliance with the order to present testimony. No abuse has been demonstrated at this point. The request for discovery by Mr. Nigro ignores the fact that he is not a target in the grand jury proceedings. He is an immunized witness before the grand jury. If he should be indicted as a result of these proceedings, protections outlined in Kastigar v. United States, 406 U.S. 411 (1972), would be

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[3]We note that the point involved in this case has been a subject of several law reviews and legal publications as noted in the Appendix.

applicable. However, at this stage of the proceedings, these motions are at best premature and contrary to Rule 6 (e), F.R.Cr.P.

Mr. Nigro also contends that he could not comply with the order to testify because the government's questions are tainted by illegal electronic surveillance. The allegation is without any substantiation. On September 24, 1982, at the hearing on this matter, the government announced that it had conducted a search of its files and could find no illegal electronic surveillance of the witness. However, valid consensual surveillance did occur. The government has agreed to provide the transcripts of those conversations. In light of these facts, alleged electronic surveillance does not afford a basis to avoid our order of July 27, 1982.

While the government has responded, we do note Mr. Nigro has not made even a preliminary showing necessary to request the government to respond to his claim of illegal electronic surveillance. The claim and cursory information submitted by Mr. Nigro is such unsubstantial evidence that it placed no burden on the government to "affirm or deny" the existence of wire-tapping. See In Re Grand Jury (Vigil), 524 F. 2d. 209, 214 (10th Cir., 1975), cert. denied 425 U.S. 927 (1976).

However, assuming that the showing by Mr. Nigro was adequate to trigger a government response, the answer and denial by the government on this point was sufficient. The witness cannot avoid testimony on the grounds advanced. See Gelband v. United States, 408 U.S. 41, 71 (1972) (White, J. concurring) and United States v. Yanagita, 552 F. 2d.

940 (2d Cir., 1977).

III

Mr. Nigro also contends that some of the questions propounded to him before the grand jury include information derived from plea discussions held in Tucson, Arizona, among his attorney, two government prosecutors, and government agents from Colorado. It appears that during Mr. Nigro's plea discussions concerning the Arizona charges, he and his attorney attempted to resolve his status with regard to the investigation now pending before Grand Jury 82-2 by proffering some information to the Colorado agents in return for a commitment not to prosecute him. All parties now agree these discussions were conducted pursuant to Rule 11 (e)(6), F.R. Cr.P. After these discussions failed to result in any agreement, Mr. Nigro

proceeded to enter a guilty plea in the United States District Court for Arizona.

Rule 11 (e)(6)(D), F.R.Cr.P. is informative. Under that Rule, Mr. Nigro's statements to the prosecutors and agents in Arizona would be admissible in any civil or criminal proceeding once a plea of guilty was accepted and not withdrawn. Rule 11 (e)(6), F.R.Cr. P.; See also, 1C. Wright, Federal Practice and Procedure §11.8 (4) (1969). Since such a plea was entered, these statements are available to the government. Accord, United States v. Benson, 640 F. 2d. 136 (8th Cir., 1981). Therefore, this argument does not afford Mr. Nigro an excuse not to present testimony before the grand jury.

IV

Mr. Nigro also asserts that Grand

Jury 82-2 has been tainted and should be excluded from hearing any other matters concerning him. He alleges that Rule 6 (d), F.R.Cr.P. was violated, as Gerald J. Rafferty, Esq., an Assistant United States Attorney, a court reporter and Mr. Nigro himself were present during grand jury deliberations and voting. The incident occurred after Mr. Rafferty asked members of the grand jury whether they approved of his taking Mr. Nigro before the United States District Court to seek immunity and an order compelling him to testify. In our view such conduct amounted to only a technical violation of Rule 6 (d). In any event any taint in insignificant and does not justify Mr. Nigro's refusal to testify before Grand Jury 82-2. Mr. Nigro's rights have not been prejudiced by the incident. Mr. Nigro at this point in time is in the position

of an immunized witness.

V

Finally, Mr. Nigro has failed to support his Motion to Quash the Writ of Habeas Corpus for failure of the Department of Justice to follow its guidelines forbidding a target defendant to be called as a witness before the grand jury and his Motion to Quash the Writ for abuse of process. Contrary to his position, the government has not used the grand jury to punish or abuse Mr. Nigro. All Motions filed by Mr. Nigro are DENIED.

VI

The above constitute the findings of facts and conclusions of law.

VII

In light of the above discussions, the Court finds as follows:

1. Grand Jury 82-2 for the District of Colorado is conducting an

investigation involving possible violations of narcotics, currency and customs laws including Title 21 U.S.C. §841 (a)(1), 846 and 848; Title 18 U.S.C. §2; and Title 26 U.S.C. §7203 and 7206 (1).

2. On July 27, 1982, this Court directed Edward Robert Nigro, Jr. to provide testimony to the grand jury, pursuant to 18 U.S.C. §6002 and §6003 (a).

3. On July 28, 1982, Edward Robert Nigro, Jr. appeared before Grand Jury 82-2 and refused to provide said testimony on the basis of various grounds discussed above.

4. After careful review of the briefs and the applicable law we find Edward Robert Nigro, Jr. has no consttutional privlege or other justification for refusing to provide testimony to Grand Jury 82-2.

O R D E R

Edward Rober Nigro's Motion to Quash the Writ of Habeas Corpus and all Motions are hereby DENIED.

The Petition of the government pursuant to 28 U.S.C. §1826 (a) for a Rule to Show Cause is GRANTED.

It is adjudged that Edward Robert Nigro, Jr. is in civil contempt of this Court for his refusal to obey the lawful order of this court and give testimony or provide other information to the grand jury.

IT IS THEREFORE ORDERED that Edward Robert Nigro, Jr. be and is hereby committed to confinement until such time as Edward Robert Nigro, Jr. is willing to give such testimony or provide such information to the grand jury.

DATED this _____ day of November, 1982, in Denver, Colorado.

BY THE COURT:

SHERMAN G. FINESILVER
Chief Judge United
States District Court

RULE 6. The Grand Jury

2/

....

(e) Recording and Disclosure of Proceedings.

....

(2) General Rule of Secrecy.--A grand juror, an interpreter, a stenogrpaher, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than it deliberations and the vote of any grand juror, may be made to--

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the

performance of such attorney's futy to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performace of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material of the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made--

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

3/

Comment, Fear of Prosecution and the Fifth Amendment, 58 Iowa L.Rev. 1304

(1972). Note, Testimony Incriminating Under the Laws of Foreign Country -- Is there a Right to Remain Silent?, 11 N.Y. U. J. Internat. Law and Pol. 359 (1978); Second Interim Report of the National Commission on Reform of Federal Criminal Laws, Mar. 17, 1969, Working Papers of the Commission; The Fifth Amendment Does Note Protect Federal Grand Jury Witnesses From Being Compelled to Give Testimony Which Would Incriminate Them in a Foreign Jurisdiction, 8 Tex. Int. L. J. 262 (1973); and Federal Witness Immunity Problems & Practice under 18 U.S.C. §6002-6007, 14 American Criminal Law Review 275, 288 (1976).

APPENDIX 3

1. Fifth Amendment to the United States Constitution:

   No person shall be held to answer for capital, or otherwise infamous crime, . . .; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; . . . .

2. 18 U.S.C. §6002 - Immunity:

   Whenever a witness refuses on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillar to-

   1. A court or Grand Jury of the United States,

   2. An agency of the United States, or

   3. Either house of Congress, a joint committee of the two houses or committee or sub-committee of either house,

   and the person presiding over the proceeding communicates to the Witness an order issued under this party, the Witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the Witness in any criminal case, except prosecution for perjury

giving a false statement, or otherwise failing to comply with the order.

3. 28 U.S.C. §1826 - Recalcitrant Witness:

A. Whenever a Witness in any proceeding before or ancillary to any court or Grand Jury of the United States refused without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document or record, recording or other material, the court, upon such refusal or when refusal is duly brought to its attention may summarily order his confinement at a suitable place until such time as the Witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of-

1. The court proceeding, or

2. The term of the Grand Jury, including extensions, before which such refusal to comply with a court order occurred, but in no event shall such confinement exceed eighteen (18) months.

B. No person confined pursuant to subsection A of this section shall be admitted to bail pending the determination of any appeal taken by him from the order of his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as

soon as practical, but no later than thirty (30) days after the filing of said appeal.

4. 18 U.S.C. §3504 (a)(1) - Litigation concerning sources of evidence:

   A. In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States:

      1. Upon a claim by a party agreed that evidence is admissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act;

   B. As used in this section "unlawful act" means any act, the use of any electronic, mechanical, or other device (as defined by §2510 (5) of this Title) in violation of the constitution or laws of the United States or any regulation or standard promulgated pursuant thereto.

5. Federal Rules of Criminal Procedure, Rule 6 (e)(2) and (3) - Rule of Secrecy and Exceptions:

   (e) The Grand Jury - Disclosure of Proceeding.

   (2) A grand juror, an interpretor, stenographer, an operator of a

recording device, a typist who transcribed recorded testimony, an attorney for the government, or any person to whom disclosure is made under Paragraph 3 (a) (ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) (a) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberation and vote of a grand jury, may be made to-

(i) any attorney for the government for use in the performance of such attorney's duties;

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duties to enforce federal criminal law.

(3) (b) Any person to whom matters are disclosed under subparagraph (a)(ii) of this paragraph shall not utilize the grand jury material for any other purpose other than assisting the attorney for the government in the performance of such attorney's duties to enforce federal criminal law. An attorney for the

shall prompty provide the District Court, before which was enpaneled the Grand Jury whose material had been so disclosed with the names of the persons to whom such disclosure has been made.

(3) (c) Disclosure otherwise prohibited by this rule of matter occurring before the Grand Jury may also be made-

(i) 1. When so directed by a court preliminary

2. Or in connenction with a judicial proceeding;

(ii) When permitted by a court at the request of the Defendant, upon a showing that grounds may exist for a motion to dismiss the indictment becuase of matters occurring before the Grand Jury.

6. Federal Rule of Criminal Procedure, Rule 11 (e)(6) - Inadmissibility of Pleas, Plea Discussions, and Related Statements:

Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the Defendant who made the plea or was a participant in the plea discussions.

1. A plea of guilty which was later withdrawn;

2. A Plea of nolo contendere;

3. Any statements made in the course of any proceedings under this

rule regarding either of the foregoing pleas; or

4. Any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn

However, such a statement is admissible:

(i) in any proceeding wherein another statement made in the course of the same plea or plea discussions had been introduced and the statement ought in fairness by considered contemporaneously with it,

(ii) in a criminal proceeding for perjury or false statement if the statement was made by the Defendant under oath, on the record, and in the presence of counsel.

APPENDIX 4

NOVEMBER TERM - Janury 11, 1983

Before the Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James W. Barrett, Honorable William W. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan and Honorable Stephanie K. Seymour, Circuit Judges.

IN RE: GRAND JURY PROCEEDINGS	)	
	)	
RE: EDWARD ROBERT NIGRO, JR., CIVIL CONTEMPT	)	
	)	No. 82-2422
EDWARD ROBERT NIGRO, JR.,	)	
	)	
Appellant,	)	
	)	
vs.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Appellee.	)	

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and

submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS,
Clerk